IN THE

Supreme Court of the United States

October Term 1944

No. ~~1344~~ 106

CLARENCE ARTHUR LANE,
PETITIONER,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

AUTHORITIES CITED

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Clarence Arthur Lane, prays that a Writ of Certiorari issue to review the decision and judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945 (R-48-51), affirming the judgment of guilt and sentence imposed upon petitioner by the District Court of the United States for the Southern District of Florida, on July 20, 1944 (R-7-8). Petition for rehearing in said cause was denied by said Circuit Court of Appeals on May 17, 1945. (R-55).

I.

SUMMARY AND SHORT STATEMENT

Petitioner was tried and convicted in the District Court of the United States for the Southern District of Florida upon an indictment containing four counts. (R. 1-4). The first count charged petitioner and a co-defendant with carrying on the business of a distiller by making mash fit for distillation without having given bond as required by the Internal Revenue laws. The second count charged possession of seventy-one gallons of distilled spirits, without Internal Revenue stamps affixed to the containers thereof. The third count charged carrying on the business of a distiller with intent to defraud the Government of Internal Revenue tax on the seventy-one gallons of spirits so produced. The fourth count charged the setting up of a distillery for the production of said distilled spirits without the requisite sign thereon as required by the Internal Revenue laws.

Petitioner was convicted on all four counts and sentenced to imprisonment for two years and to pay a fine of $100.00 on each of the first and third counts of the indictment, two years and one day imprisonment on the second count, and six months imprisonment on the fourth count, all sentences to run concurrently.

Petitioner was tried jointly with his co-defendant Walter Lane, an uncle of petitioner, but at the conclusion of the Government's case in chief Walter Lane changed his plea from Not Guilty to Guilty (R-28) and the trial proceeded against petitioner solely.

On September 21, 1943, three government investigators of the Alcohol Tax Unit, McDonald, McMullen

and Anderson, came upon a moonshine still "about two miles south of Zephyrhills a little off of the Plant City road" (R-12). The still was near the edge of a swamp not far from a little stream. The agents came up from the swamp through the underbrush a distance of about 40 feet. The still was in operation. Three men were working at the still and after a period of time they evidently spied one of the agents and started to run (R-13). Co-defendant Walter Lane was apprehended about one hundred feet away from the still, while the other two men escaped. (R-13). Agent McMullen presumed to identify petitioner as being one of the two men who escaped, Agent McDonald was doubtful of his identification of petitioner, while Agent Anderson could not identify petitioner at all. (R-17; 21-22; 26-27). A model A Ford truck was seized about one hundred fifty feet away from the still-site and later confiscated (R-13; 15-16). The truck "looked like" one previously sold by witness A. F. Griffin to "one of the Lane boys". The truck was not otherwise connected with petitioner (R-24). Containers were found at the still without revenue stamps thereon and there was no sign at the still-site as required by the revenue laws (R-15). The third man at the still was never identified.

Leaving the still, two of the agents went to petitioner's home several miles away from the still toward Zephyrhills and left word with his wife for petitioner to "come in" the next day and make bond (R-14). He did not "come in" the next day so the agents that afternoon took out an "arrest warrant" for petitioner and on the following day the agents, together with the deputy United States Marshal, went to petitioner's home. Finding no one there the agents proceeded to make an exploratory search of the premises inside and out (R-14). They found what they termed "a square copper

still" also a stock of cartons and some glass jugs. Later, armed with a search warrant subsequently procured, the agents returned to petitioner's home and "searched the premises" (R-14). No one was at home but the agents left word with petitioner's uncle that they would leave a copy of the search warrant "in the garage." Numerous articles, such as jugs, glass jars, sacks of scratch feed, etc., were found and seized "and brought into Tampa". No search warrant was ever offered or admitted in evidence. These articles so seized were later admitted in evidence (R-23). No formal objection was made to the introduction.

Petitioner produced witnesses in an effort to establish an alibi. These witnesses, J. D. Wells and W. H. Barber, placed the petitioner in Dade City, Florida, fifteen miles away from the still-site, at the time of the raid (R-29-31). Petitioner himself testified that he was in Dade City at the time (R-34-36).

Petitioner made two contentions before the Circuit Court of Appeals: First, that the evidence, particularly on the part of identification of petitioner, was insufficient; and, Second, that the seizure of the articles at petitioner's home and their subsequent introduction in evidence, without showing of lawful right to search, was a violation of petitioner's constitutional rights under the Fourth and Fifth Amendments. Because of the limited scope of the Writ of Certiorari in this Court, the first of these contentions will not be presented and will be considered as having been foreclosed by the judgment of affirmance in the Circuit Court of Appeals.

II.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Opinion of the United States Circuit Court of Appeals for the Fifth Circuit, entered April 24, 1945, is not yet reported, but is attached as an appendix hereto, marked Exhibit A.

III.

BASIS OF JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment and opinion entered in this cause by the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240 (a) of the Judicial Code of the United States, as amended. 28 U. S. C. A. 347 (a).

The Opinion of the Circuit Court of Appeals for the Fifth Circuit was filed April 24, 1945, Order Denying Rehearing was filed May 17, 1945, and this Petition is presented and filed in the office of the Clerk of this Honorable Court within a time less than thirty days therefrom.

IV.

QUESTIONS PRESENTED

The sole fundamental question presented in this petition is as follows:

(1) The introduction in evidence of the articles seized at petitioner's home, absent showing of lawful right to search for and seize the same, violated petitioner's rights under the Fourth and Fifth Amend-

ments, and such violation was not cured or waived by failure of petitioner's counsel at the trial to object.

V.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved herein are set forth in the appendix to the accompanying Brief marked Exhibit A thereof and by reference made a part of this petition.

VI.

REASONS FOR GRANTING THE PETITION

(1) The Circuit Court of Appeals, in holding that the search of petitioner's home and the seizure of articles therein, and their subsequent introduction in evidence against petitioner, was legal and violated no right of petitioner, has decided an important Federal question in a way that is probably in conflict with applicable decisions of this Honorable Court.

(2) The Circuit Court of Appeals, in holding as aforesaid, and relying also upon failure of petitioner's counsel to object at the trial, has decided a Federal question in a way probably in conflict with applicable decisions of this Honorable Court.

VII.

NATURE OF CASE, STATEMENT OF GROUNDS, QUESTION INVOLVED IS SUBSTANTIAL, AND CASES SUSTAINING JURISDICTION

This is a case where a man's home was searched, articles taken therefrom and later introduced in evi-

dence against him, without there being shown by the government that the Federal officers had a right to raid his home and search it. The search was made in the absence of petitioner. The articles constituted a very important part of the government's proof at the trial. The officers first had a Federal warrant for petitioner's arrest, but when they went to his home he was not there. Undaunted, the officers searched his home and premises. Based upon what they observed there in the absence of petitioner, the officers returned to Tampa and were supposed to have procured a search warrant. They returned to petitioner's home, again found no one there, but proceeded to search the place all over again, seized the articles and brought them to Tampa. They were later introduced at the trial, but peculiarly enough, neither the search warrant nor the warrant of arrest, as legal prerequisites of the validity of the search and seizure, were never produced nor were they ever even offered at the trial. It is true that petitioner's trial attorney made no objection when the articles were offered in evidence, and the main burden of the government's case on the appeal to the Circuit Court of Appeals was that even if the search and seizure were illegal and the introduction of the seized articles erroneous, petitioner had waived his constitutional right to object after they were introduced.

This case presents squarely the proposition of whether or not the government may use those articles admittedly seized from and out of a person's homeplace in evidence against him in a criminal prosecution without first showing that they were lawfully obtained and that his constitutional rights under the Fourth and Fifth Amendments were not being invaded.

That such a question is substantial cannot be gainsaid. The most fundamental rights of a resident of this country are those contained in the Bill of Rights, among which is the protection against unreasonable search and seizure and the protection against compulsory self-incrimination. The Constitution and laws of the United States are explicit on the manner in which the search of a man's home may be made. These provisions are exclusive and must be strictly followed. Courts should be zealous to see that the constitutional rights of the citizen are protected and preserved. Constitutional guaranties must be kept alive even if new breath must be breathed into the fabric of the law from time to time. The McNabb case (318 U. S. 332) and the Malinski case (65 S. Ct. 781) point the way to this view.

Cases believed to sustain the jurisdiction of this Court as showing the substantial character of the question here presented are as follows:

McNabb vs. *U. S.*, 318 U. S. 332.

Malinski vs. *The People of the State of New York*, 65 S. Ct. 781.

Amos vs. *U. S.*, 255 U. S. 313.

Boyd vs. *U. S.*, 116 U. S. 616.

Chavez vs. *U. S.*, 277 U. S. 591.

Clyatt vs. *U. S.*, 197 U. S. 207.

Go-Bart Importing Co. vs. *U. S.*, 282 U. S. 344.

Grau vs. *U. S.*, 287 U. S. 124.

Savage vs. *U. S.*, 257 U. S. 644.

Silverthorne Lumber Co. vs. *U. S.*, 251 U. S. 385.

WHEREFORE it is respectfully submitted that this petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit be granted.

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EXHIBIT A

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED APRIL 24, 1945.

Before SIBLEY, WALLER, and LEE,
Circuit Judges.

SIBLEY, Circuit Judge: Appellant Clarence Arthur Lane and his uncle, Walter D. Lane, were indicted for carrying on the business of a distiller without giving bond and with intent to defraud the United States of the tax, for possessing unstamped liquors, and for working at an unlawful distillery. During the trial the last named withdrew his plea of not guilty and pleaded guilty. The appellant was convicted on all counts, was sentenced, and appeals. Two points are argued in his behalf: 1, The motion for a verdict of acquital ought to have been granted. 2. It was error to admit evidence procured by a search without a warrant of the premises around his home, though no objection to its admission was made.

I. Two witnesses for the prosecution testified to watching three men operating two stills near midday and less than 100 feet distant, for fifteen or twenty minutes, and to recognizing the two Lanes, but not being acquainted with the third man who escaped. Walter Lane only was caught at that time. Seventy-one gallons of whiskey had been made and put into syrup jugs. A Ford truck was hidden in the bushes, the truck showing that it had been used in hauling material to the stills. It was proven that the truck had been seen at appellant's house a number of times, and was driven by him. A warrant of arrest was taken to appellant's home the next day, but he was not at home. In looking for him the officers observed a part of a still in the open near his house, and in the garage saw some feed sacks and syrup jugs like those at the still. The next day they returned with a search warrant and found a large number of the glass jugs in cartons, several sacks of the same brand of "scratch feed" as the mash at the

still was made of with syrup added. A little charcoal and some bricks like those used at the stills was also found. For the defense, appellant testified that he was not at the stills and had nothing to do with them, but was several miles away near Dade City when they were raided. He said he had the feed at his house for his chickens, but they had died off; the jugs contained and had contained syrup, about 100 gallons, but none had been used to make liquor. The alleged still at his house he used as a watering trough. Three other witnesses made out a strong alibi, if they were correct about the date they saw appellant at and near Dade City. Walter Lane did not testify.

It is not unusual that positive identification of an accused is met by evidence of alibi. The truth between the two is a matter for the jury. There was no error in submitting the question to them.

2. No error appears in reference to the evidence of what was found at appellant's home. The first time the officers went there they had a warrant of arrest, and had right to look round the house and in the garage for the person they sought. What they saw was open to view, and can hardly be called a search. They returned with a search warrant and saw the same things and found much more. Appellant did not see fit to interpose any objection to the evidence, but elected to rely upon explanation. No ruling of the court was invoked. No error was committed.

JUDGMENT AFFIRMED.

A True copy:
Teste:

OAKLEY F. DODD
Clerk of the United States Circuit Court
(Seal) of Appeals for the Fifth Circuit.